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11 Attorneys for South Orange County Wastewater Authority

12 BEFORE THE STATE WATER QUALITY CONTROL BOARD
13
14

15 In the matter of

SWRCB File _____

16 Request for Permit Modification by
17 South Orange County Wastewater
Authority for Order No. R9-2006-
18 0054, NPDES No. CA01074717,
discharge from the San Juan Creek
19 Ocean Outfall to the Pacific Ocean
20

PETITION FOR REVIEW; MEMORANDUM
OF POINT AND AUTHORITIES IN SUPPORT
THEREOF
[Water Code § 13320]

21 Petitioners South Orange County Wastewater Authority ("SOCWA") and South Coast
22 Water District ("SCWD") (collectively referred to as "Petitioners") hereby petition for review of the
23 San Diego Regional Water Quality Control Board's ("Regional Board") denial of SOCWA and
24 SCWD's Request for Permit Modification for Order No. R9-2006-0054, NPDES No. CA01074717
25 ("Permit Modification Request" or "Request"). A copy of said Request is attached hereto as
26 Exhibit A. A statement of points and authorities in support of this petition is concurrently filed
27 herewith, as required by Title 23, California Code of Regulations, Section 2050(a).
28

1 SOCWA and SCWD previously filed In Re: Petition of South Orange County Wastewater
2 Authority and South Coast Water District for Review of Adoption of Administrative Liability Order
3 No. R-2009-0048 (SWRCB File No. A-2035) ("A-2035") on or about July 30, 2009. A-2035 is an
4 appeal of an administrative liability order imposing mandatory minimum penalties (MMPs) as a
5 result of alleged violations of the same NPDES permit at issue in the present case. Because the
6 cases are legally and factually related, SOCWA and SCWD hereby request that the present case and
7 A-2035 be heard together pursuant to Title 23, California Code of Regulations, section 2054.

8 Petitioners further request the opportunity to file supplemental points and authorities in
9 support of the Petition for Review once the administrative record becomes available.¹ Petitioners
10 also reserve the right to submit additional arguments and evidence responsive to the Regional
11 Board's or other interested parties' responses to the Petition for Review, to be filed in accordance
12 with Title 23, California Code of Regulations, section 2050.5.

13 **I. NAME, ADDRESS, TELEPHONE NUMBER AND E-MAIL ADDRESS OF**
14 **PETITIONER**

15 Petitioner SOCWA owns and holds the NPDES permit for the San Juan Creek Ocean
16 Outfall ("SJCOO") on behalf of all its member agencies (Order No. R9-2006-0054, NPDES No.
17 CA0107417 (the "2006 NPDES Permit"). SOCWA's contact information is as follows:

18 South Orange County Wastewater Authority
19 c/o Tom R. Rosales
20 General Manager
21 34156 Del Obispo Street
22 Dana Point, CA 92629
23 Tel: (949) 234-5421
24 trosales@SOCWA.com

25 Petitioner SCWD is a member agency of SOCWA and operates the Groundwater Recovery
26 Facility ("GRF") and discharges brine to the SJCOO pursuant to the 2006 NPDES permit. SCWD's
27 contact information is as follows:

28 ¹ At the time of this filing, SOCWA and SCWD have been informed there is no transcript of the
hearing of the December 16, 2009, but there is a audio recording. That has been requested, but not
yet received nor transcribed. SOCWA and SCWD specifically reserve the right to cite to this
transcript once it becomes available by way of a supplement filing.

1 South Coast Water District
2 c/o Michael Dunbar
3 General Manager
4 P.O. Box 30205
5 Laguna Niguel, CA 92607-0205
6 Tel: (949) 499-4555
7 mdunbar@SCWD.org

8 In addition, all materials in connection with the petition, and the administrative record
9 should be provided to SOCWA and SCWD's counsel:

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11 Miles • Chen Law Group, P.C.
12 9911 Irvine Center Drive, Suite 150
13 Irvine, California 92618
14 Tel: (949) 788-1425
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17 Brownstein Hyatt Farber Schreck, LLP
18 2029 Century Park East, Suite 2100
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20 Tel: (310) 500-4600
21 shoch@bhfs.com

22 **II. THE SPECIFIC ACTION OF THE REGIONAL BOARD THAT THE STATE**
23 **WATER RESOURCES CONTROL BOARD IS REQUESTED TO REVIEW**

24 SOCWA and SCWD petition the State Water Resources Control Board ("State Board") to
25 review the Regional Board's denial of SOCWA and SCWD's Request for Permit Modification for
26 Order No. R9-2006-0054, NPDES No. CA01074717. The Regional Board's actions are described
27 in more detail in the accompanying Points and Authorities in Support of Petition for Review..

28 **III. THE DATE ON WHICH THE REGIONAL BOARD ACTED**

The Regional Board issued a letter to SOCWA dated December 10, 2009 denying SOCWA
and SCWD's Request for Permit Modification. A copy of this letter is attached as Exhibit B,
including its attached December 10, 2009 memorandum.

1 **IV. THE SUBSTANTIVE ISSUES OR OBJECTIONS RAISED IN THE PETITION**
2 **WERE RAISED BEFORE THE REGIONAL BOARD**

3 The substantive issues and objections raised in the petition were raised with the Regional
4 Board staff in meetings and correspondence, presented to the Regional Board in written comments
5 submitted on or about July 6, 2009, August 31, 2009, October 6, 2009, and October 29, 2009, and in
6 testimony before the Regional Board on December 16, 2009. The details of the substantive issues
7 raised before the Regional Board are described in more detail in the accompanying Points and
8 Authorities in Support of Petition for Review

9 **V. THE PETITION HAS BEEN SENT TO THE REGIONAL BOARD**

10 Pursuant to section 2050(a)(8) of Title 23, California Code of Regulations, a true and correct
11 copy of this Petition was mailed by Overnight Mail on January 8, 2010, to the Regional Board at the
12 following address:

13
14 Mr. David W. Gibson
15 Executive Officer
16 Regional Water Quality Control Board - San Diego Region
17 9174 Sky Park Court, Suite 100
18 San Diego, CA 92123-4353

18 **VI. A FULL AND COMPLETE STATEMENT OF THE REASONS THE REGIONAL**
19 **BOARD'S DENIAL OF THE PERMIT MODIFICATION REQUEST WAS**
20 **INAPPROPRIATE OR IMPROPER.**

21 A full and complete statement of the reasons the Regional Board's denial of the Permit
22 Modification Request is described in detail in the accompanying Points and Authorities in Support
23 of Petition for Review

24 **VII. THE MANNER IN WHICH THE PETITIONERS ARE AGGRIEVED.**

25 Petitioners are aggrieved by the denial of the Permit Modification Request. The denial was
26 an erroneous, arbitrary and capricious application of Environmental Protection Agency ("EPA")
27 policy to the GRF, unsupported by law, and therefore, should not be sustained. A full and complete
28

1 statement as to the manner in which Petitioners have been aggrieved is contained in the
2 accompanying Points and Authorities in Support of Petition for Review

3 **VIII. THE SPECIFIC ACTION BY THE STATE BOARD WHICH PETITIONERS**
4 **REQUEST**

5 Denial of SOCWA and SCWD's Request for Permit Modification for Order No. R9-2006-
6 0054, NPDES No. CA01074717 was improper, not supported by law and was otherwise arbitrary
7 and capricious. As such the State Board should reverse the Regional Board's denial of the Request
8 and grant the Request for Modification because:

- 9 • The Request should have been granted to correct technical mistakes, such as
10 errors in calculation, or mistaken interpretations of law made in determining
11 permit conditions.
- 12 • The Request should have been granted because new information not available
13 at the time of permit issuance (other than revised regulations, guidance, or
14 test methods) justifies new permit conditions. See 40 C.F.R. §122.62.

15
16 Date: January 8, 2010

Respectfully submitted,

MILES • CHEN LAW GROUP, P.C.

17
18 By: Pat Chen
19 Patricia J. Chen

20
21 Date: January 8, 2010

BROWNSTEIN HYATT FARBER
SCHRECK, LLP

22
23 By: Kari N. Vozenilek
24 Steven L. Hoch
25 Kari N. Vozenilek
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PETITION

I. INTRODUCTION

This appeal raises substantial issues of law and policy that the State Water Resources Control Board ("State Board") is uniquely equipped to handle, particularly in light of the current dire water shortages in Southern California, the need to find long term and sustainable sources of water for the future, and the State Board's policies of recycling and reclamation. In denying SOCWA and SCWD's Request for Permit Modification for Order No. R9-2006-0054, NPDES No. CA01074717 ("Permit Modification Request" or "Request"), the Regional Board not only violated the laws and policies of this state, it has left Petitioners handicapped with respect to SCWD's operation of its groundwater recovery facility ("GRF"). The GRF is an vital project needed to meet up to 20 percent of SCWD's future water supply demand.

As noted in further detail below, the GRF was designed when SOCWA's NPDES permit (the "2000 NPDES Permit") designated the compliance point at the San Juan Creek Ocean Outfall ("SJCOO"). Prior to the start up of the GRF in June 2007, the NPDES Permit was modified to require a compliance point at the GRF in addition to the outfall (the "2006 NPDES Permit"). Said modification in terms of the GRF was improper and is explained further herein and in Petition A-2035. After start up of the GRF the new standards could not be met. However, at no time was there any effluent limit violation at the SJCOO. That is, the GRF's brine discharge did not impact the environment insofar as it did not cause the SJCOO to violate the Ocean Plan standards. But because of the errors made in applying the 2006 Permit to the GRF, SCWD's engineers were forced to resort to a structural solution that is undesirable from an operational standpoint. In May 2008, they developed a temporary solution which SCWD implemented, i.e., the installation of a holding tank and diversion of the brine flow via an above-ground pipe to the sewer system for disposal through SOCWA's J.B. Latham Treatment Plant located in Dana Point, California (the "Latham Plant"). See Exhibit C, SCWD San Juan Creek Property Photograph. This solution is only temporary since an increase in volume of brine effluent will occur with a planned expansion of the GRF, thereby necessitating even greater capital facilities expenditures and creating an impediment

1 to SOCWA's continuing and ongoing efforts to explore and implement advanced wastewater
2 treatment ("AWT") projects (e.g., recycled water) for its member agencies at the Latham Plant.

3 In various hearings before the Regional Board regarding the issues raised with respect to A-
4 2035, the Regional Board members themselves recognized that SOCWA and SCWD are trapped
5 between a proverbial rock and a hard place as SCWD cannot expand operations of the GRF and
6 produce additional potable water without compromising the recycled water program at the Latham
7 Plant. That is, SCWD has been forced to discharge its brine effluent to the sewer rather than to the
8 SJCOO notwithstanding the fact that discharge of the brine effluent did not (and would not) cause
9 the outfall to be in violation of the Water Quality Control Plan for Ocean Waters of California (the
10 "Ocean Plan")² standards.

11 SOCWA and SCWD assert that the change in the monitoring point imposed in the 2006
12 NPDES Permit was based on the mistaken application of technical standards and mistaken
13 interpretations of law. Furthermore, new information not available at the time of permit issuance
14 justifies new permit conditions. More specifically, SOCWA and SCWD assert:

- 15 ► The 2006 NPDES permit erroneously applies the Ocean Plan standards to the GRF;
- 16 ► Changes in the 2006 NPDES permit resulted from a misinterpretation of EPA's position
17 with respect to Publicly Owned Treatment Works ("POTWs");
- 18 ► There is no discharge to waters of the United States at the GRF;
- 19 ► There was no information at the time of the 2006 NPDES permit issuance regarding the
20 operational aspects of the GRF and the impacts on the Latham Plant.

21 Pursuant to 40 C.F.R. §122.62, SOCWA and SCWD requested that the Regional Board
22 modify the 2006 NPDES Permit so that the monitoring requirements of the 2000 NPDES Permit
23 were reinstated as applied to the GRF facility, i.e., the point of compliance for the GRF would be at
24 the SJCOO rather than at the GRF. The Regional Board denied this request. As will be discussed
25 in more detail below, the reasons for the denial are arbitrary and capricious and unsupported by law.

26 ² The Ocean Plan has been amended numerous times. The State Water Resources Control
27 Board ("State Board") adopted the latest amendment on April 21, 2005 which was approved by
28 United States EPA on February 14, 2006. The Ocean Plan may be found at
http://www.swrcb.ca.gov/water_issues/programs/ocean/docs/oplans/oceanplan2005.pdf

1 SOCWA and SCWD envision this Petition as an opportunity for the State Board not only to
2 correct the error of the Regional Board but also to evaluate the broader policy implications of rote
3 application of Ocean Plan standards on facilities like the GRF, which are neither POTWs nor
4 industrial dischargers, in light of Southern California's severe water shortage.

5 This Petition is a further opportunity for the State Board to give clear support to policies it
6 has promulgated mandating the use of degraded water resources wherever possible to alleviate the
7 State's severe water shortage impacts.

8 **II. BACKGROUND**

9 **A. Parties:**

10 **1. SOCWA**

11 SOCWA is a Joint Powers Authority created on July 1, 2001 as a successor authority under
12 the consolidation of three prior joint powers authorities, consisting of ten member agencies:

13 El Toro Water District	City of San Clemente
14 Emerald Bay Service District	South Coast Water District
15 Irvine Ranch Water District	City of San Juan Capistrano
16 City of Laguna Beach	Santa Margarita Water District
17 Moulton Niguel Water District	Trabuco Canyon Water District

18 SOCWA's member agencies serve the following cities and areas:

19 Aliso Viejo	Rancho Santa Margarita
20 Ladera	San Clemente
21 Laguna Beach	Mission Viejo
22 Lake Forest	Trabuco Canyon
23 Coto de Caza	Emerald Bay
24 Laguna Woods	Talega
25 Las Flores	Dana Point
26 San Juan Capistrano	Laguna Hills
27	
28 Laguna Niguel	

1 SOCWA is the legal successor to the Aliso Water Management Agency, South East
2 Regional Reclamation Authority and South Orange County Reclamation Authority. SOCWA's
3 boundaries encompass approximately 220 square miles and include: Aliso Creek, Salt Creek,
4 Laguna Canyon Creek and the San Juan Creek Watersheds. SOCWA's member agencies serve
5 over 500,000 residents.

6 SOCWA's mission is to collect, test, beneficially reuse, and dispose of wastewater in an
7 effective and economical manner. It acts in a manner that respects the environment, maintains the
8 public's health and meets or exceeds all local, state and federal regulations for the mutual benefit of
9 SOCWA's ten member agencies and the general public in South Orange County. SOCWA
10 provides, at a minimum, full secondary treatment at all of its regional wastewater facilities, and also
11 has active water recycling, industrial waste (pretreatment), biosolids management and ocean
12 shoreline monitoring programs to meet the needs of its member agencies and the requirements of
13 the applicable NPDES permits.

14 SOCWA holds the 2006 NPDES Permit for the SJCOO on behalf of five of its member
15 agencies including SCWD, Santa Margarita Water District, Moulton Niguel Water District, City of
16 San Clemente, and City of San Juan Capistrano

17 2. SCWD

18 SCWD is a retail water agency organized and existing as a County Water District under
19 California Water Code Section 30000 *et seq.* SCWD serves approximately 12,500 water accounts
20 with an estimated winter population of 40,000 in the South Laguna and Dana Point areas. Tourism
21 adds an additional 2 million visitors to the SCWD service area on an annual basis. SCWD imports
22 approximately 7,500 acre-feet (6.7 million gallons per day ("gpd")) of potable water annually.
23 SCWD maintains approximately 32 million gallons of water storage in 14 area reservoirs (an
24 approximately 4.8-day water supply). The SCWD service area has been identified by the Bureau of
25 Reclamation as an area of "Potential Water Supply Crisis" by 2025. SCWD's wholesale water
26 providers, the Municipal Water District of Orange County ("MWDOC") and the Metropolitan
27 Water District of Southern California ("MWD"), have encouraged the development of alternative
28

1 local water supply sources within the area served by SCWD.³

2 **B. The SJCOO**

3 SOCWA owns and operates the SJCOO, which receives treated effluent from the following
4 municipal wastewater treatment plants: the Latham Plant, the Santa Margarita Water District
5 Chiquita Water Reclamation Plant, the Moulton Niguel Water District 3A Reclamation Plant and
6 the City of San Clemente Reclamation Plant. In addition, a number of dry-weather nuisance
7 discharges from a number of sources and brine discharges from the City of San Juan Capistrano and
8 the SCWD are also routed to the SJCOO. The SJCOO extends 2 miles off Doheny Beach in Dana
9 Point and has a permitted flow of 36.385 million gpd. The SJCOO is constructed of an extended
10 bell and spigot reinforced concrete pipe, 57 inches in diameter, with a minimum wall thickness of 8
11 inches.

12 The SJCOO is governed by the requirements of the Ocean Plan for protection of the
13 beneficial uses of the State ocean waters. The Ocean Plan is applicable, in its entirety, to point
14 source discharges to the ocean.

15 **C. The GRF**

16 The GRF, as designed by SWCD, treats low quality brackish groundwater removed from the
17 San Juan Creek Groundwater Basin to produce drinking water distributed to SCWD customers.
18 This resource would otherwise remain unusable. The GRF water treatment process primarily
19 consists of reverse osmosis ("RO") and iron/manganese removal. With the support of the MWD,
20 SCWD spent \$5.8 million to construct the GRF and designed it *to produce approximately 10% of*
21 *SCWD's potable water* in Phase I. The construction of the facility and associated groundwater
22 rights are such that the GRF is planned for expansion in Phase II *to supply up to 20% of local*
23 *potable water* needs using a local resource. SCWD considers the GRF a model project for the
24 promotion of a new source of water through treatment of degraded water resources consistent with
25 state policy guidance. The current requirement for disposal of brine to the sewer system imperils

26 ³ The MWD has also expressed support for SCWD's request for an amendment to the 2006 NPDES
27 Permit to allow compliance to be determined at the SJCOO, rather than at the GRF. See Exhibit A,
28 Attachment 1 (Letter from Jeffrey Kightlinger, MWD, to Michael P. McCann dated October 27,
2008).

1 the planned Phase II expansion (which entails installing additional wells) because it is unclear
2 whether the Latham Plant can handle the additional brine discharge from the additional wells. As
3 discussed in more detail below, the salinity of the influent to the plant may compromise SOCWA's
4 future consideration of recycled water program at the Latham Plant.

5 As conceived, designed and originally built, the GRF's brine discharge was conveyed by an
6 18" PVC pipeline to the Chiquita Land Outfall which then commingled directly with other
7 discharge sources at the SJCOO. Significantly, the brine discharge never entered any stream, lake,
8 pond, ditch or other such body of water prior to the point of blending with the SJCOO.

9 **1. GRF Permit History**

10 **a. The 2000 NPDES Permit**

11 The 2000 NPDES Permit described the disposal of the waste stream from the planned GRF
12 as the following: "...0.32 M [million] gallons/day will be discharged through the Chiquita Land
13 Outfall to the [South East Reclamation Regional Authority] SERRA SJCOO." In addition to the
14 GRF, the following additional facilities were included in the 2000 NPDES Permit for discharge to
15 the SJCOO:

16 Latham Plant
17 City of San Clemente WRF
18 SMWD Chiquita Water Reclamation Plant
19 Moulton Niguel Water District 3A Reclamation Plant
20 Santa Marguerita Water District Oso Creek WRP

21 According to the "Monitoring and Sampling Plan" included in the 2000 NPDES Permit, the
22 combined effluent from the above facilities was sampled at a point "...downstream of any in-plant
23 return flows, and disinfection units, where representative samples of the effluent discharged through
24 the ocean outfall can be obtained." According to the 2000 NPDES Permit, the requirements for
25 effluent discharge from the SJCOO are based on the 1997 California Ocean Plan.⁴ The 2000
26 NPDES Permit allowed disposal of facility effluent to the ocean via the SJCOO and required
27 sampling at the SJCOO. It took two years to construct the GRF beginning in approximately June
28 2005.

⁴ See April 20, 2009 letter from Environmental & GIS Services, LLC to the Regional Board on
behalf of SCWD ("eGIS Letter"). Exhibit 1, Attachment 2.

1 **b. The 2006 NPDES Permit**

2 The GRF was designed in the 2001-2002 timeframe to be compliant with the 2000 NPDES
3 Permit. According to the 2000 NPDES Permit, the requirements for effluent discharge from the
4 SJCOO are based on the 1997 California Ocean Plan. The 2000 NPDES Permit allowed disposal of
5 facility effluent to the ocean via the SJCOO and required sampling at the SJCOO. It took two years
6 to construct the GRF beginning in approximately June 2005. In 2006, protracted negotiations with
7 the Regional Board occurred with respect to the 2000 NPDES Permit renewal, and in August 2006,
8 the Regional Board issued the 2006 NPDES Permit, which required SOCWA and its member
9 agencies to sample effluent at their respective facilities prior to discharging into the SJCOO.

10 The 2006 NPDES Permit establishes effluent limitations for the GRF based on Table A of
11 the Ocean Plan. *See* 2006 NPDES Permit, at 13. These effluent limitations are the same for the
12 SJCOO. According to the Ocean Plan, Table A effluent limitations are a "default" standard as they
13 "apply only to publicly owned treatment works and industrial discharges for which Effluent
14 Limitations Guidelines have not been established pursuant to Sections 301, 302, 304, or 306 of the
15 Federal Clean Water Act." Ocean Plan at 1. However, the Ocean Plan fails to define either
16 "publicly owned treatment works" or "industrial discharges." *See* Ocean Plan, Appendix I
17 (Definition of Terms).

18 **D. Factual and Procedural Background**

19 In order to alleviate a portion of SCWD's reliance on the State's troubled water resources,
20 SCWD decided to develop its own local source of potable water with the support of MWD. SCWD
21 designed the GRF in the 2001-2002 timeframe when the 2000 NPDES Permit specified the SJCOO
22 as the sampling point for compliance with effluent limitations. Construction of the plant began in
23 approximately June 2005, and was completed two years later. In August 2006, the Regional Board
24 issued the 2006 NPDES Permit, effective October 2006, which required SOCWA's member
25 agencies to sample their effluent at their respective facilities, prior to discharging into the SJCOO.
26 This reversal of regulatory interpretation directly impacted SCWD as it was about to begin
27 operating the GRF, which was designed to discharge directly into the SJCOO. At that time, it was
28 unclear whether the GRF's treatment process would be sufficient to meet all of the limitations set

1 forth in the 2006 NPDES Permit as amended to require compliance testing at the GRF.

2 Between June 2007 and February 2008, ECO Resources, Inc. operated the GRF. During this
3 period, the plant was operating only sporadically as adjustments were made to the operations to
4 address start up issues including the sampling of effluent. In the December 2007 time period, it
5 became clear that the quality of the brackish water from the basin was going to routinely result in a
6 brine discharge with remarkably higher TSS than previously expected. At that point it was clear an
7 ongoing series of unavoidable violations would occur placing the whole project in jeopardy. SCWD
8 developed a temporary solution, i.e., the installation of a holding tank and diversion of the brine
9 flow via pipe to the sewer system for disposal into and through the Latham Plant.

10 On or about June 27, 2008, the Regional Board issued ACL Complaint No. R9-2008-0064
11 which detailed effluent violations of the 2006 NPDES Permit at the GRF from August 2007 through
12 March 2008. On July 10, 2008, SCWD's board approved the temporary remedy. On or about
13 August 14, 2008, the Regional Board issued ACL Complaint No. R9-2008-0093 which superseded
14 the earlier ACL complaint. On August 27, 2008, SCWD entered into a contract with Pascal &
15 Ludwig ("Pascal") to implement the proposed remedy. Pascal completed the project on or about
16 November 22, 2008 at a cost of approximately \$225,000.

17 On or about February 27, 2009, the Regional Board issued the ACL Complaint No. R9-
18 2009-0028 ("ACLC") which superseded the August 14, 2008 ACL complaint and imposed MMPs
19 in the amount of \$204,000. The ACLC included all the purported violations through
20 implementation of the remedy in November 2008.

21 SOCWA and SCWD timely challenged the ACLC before the Regional Board on the
22 grounds that the MMPs simply do not apply in this case because: (1) the particular effluent
23 limitations at issue are not subject to MMPs (2) SCWD is neither an industrial discharger or POTW;
24 (3) abatement of SCWD's discharge of brine effluent to the outfall does not assist in bringing the
25 outfall into compliance; and (4) no economic benefit could result from SCWD's non-compliance
26 with the effluent limits. Moreover, SOCWA and SCWD also argued as a matter of policy that the
27 change in the sampling protocol in the 2006 NPDES Permit should have been limited to POTWs.
28 Continued discharge of the brine effluent from the GRF to the sewer was (and is) highly

1 problematic because the brine affects SOCWA's ability to implement a recycled water program at
2 the Latham Plant.

3 The Regional Board held hearings on the ACLC on May 13, 2009 and July 1, 2009. At the
4 May 13, 2009 meeting, the Regional Board members expressed great concern about applying
5 MMPs to facilities that were producing sustainable new local sources of water. A few members
6 wanted to refer the case directly to the State Board because of the important policy issues raised by
7 SOCWA and SCWD. The Regional Board members deadlocked twice on motions to impose the
8 MMPs, and asked the parties for additional briefing on whether the Board has any discretion not to
9 impose MMPs. A subsequent hearing was held on July 1, 2009 and at this hearing, the Regional
10 Board decided that it had no discretion to not apply MMPs and it imposed the MMPs with a 6:1
11 vote.

12 SOCWA and SCWD have appealed this decision and the Petition for Review is currently
13 pending before the State Board. *See In Re: Petition of South Orange County Wastewater Authority*
14 *and South Coast Water District for Review of Adoption of Administrative Liability Order No. R-*
15 *2009-0048* (SWRCB File No. A-2035) ("A-2035") filed on or about July 30, 2009. Because of the
16 overlapping factual and legal issues, SOCWA and SCWD request that this Petition and A-2035 be
17 heard together pursuant to Title 23, California Code of Regulations, section 2054.

18 Relying in part on the suggestions by the Regional Board members from the hearing on the
19 ACLC⁵, and because SOCWA and SCWD believed that errors had been made in regard to the
20 application of the 2006 NPDES Permit as it was applied to the GRF, SOCWA and SCWD
21 submitted several letter requests for a permit modification on or about July 6, 2009 and August 31,
22 2009. *See Exhibits D and E.* In response, SOCWA received a voicemail from Regional Board staff
23 indicating that (1) staff was not interested in opening up the 2006 NPDES Permit to change the
24 compliance points for the GRF and (2) rejection of SOCWA and SCWD's request was based on a
25 finding by the State Board that technically based effluent limits ("TBELs") apply to the GRF. *See*
26 *Exhibit F.*

27
28 ⁵ SOCWA and SCWD petitioned the State Board for review of the ACLC order on or about July 30,
2009 (SWRCB File No. A-2035). The matter is currently pending.

1 SOCWA and SCWD then sent a subsequent letter dated October 6, 2009 requesting a
2 hearing with respect to the request for permit modification and indicating that supporting documents
3 would follow. *See* Exhibit G. In response, Regional Board staff sent an email to SOCWA asking
4 SOCWA to "hold off on submitting a formal application to modify the NPDES permit" until the
5 Regional Board staff completed its review of the consistency of the Regional Board's application of
6 Ocean Plan standards to brine discharges in its jurisdiction. *See* Exhibit H. This staff member,
7 Michael P. McCann, Assistant Executive Officer, also wrote, "[t]here is a good chance that the
8 results of the review would make an application for modification moot." *Id.* Because SOCWA and
9 SCWD wanted the Regional Board staff to have all relevant information with respect to its review
10 of its request, SOCWA and SCWD submitted its formal Request for Permit Modification on or
11 about October 29, 2009 on the grounds that (1) the 2006 NPDES Permit erroneously applies the
12 Ocean Plan standards to the GRF; (2) changes in the 2006 NPDES permit resulted from a
13 misinterpretation of EPA's position with respect to POTWs; (3) there is no discharge to the waters
14 of the United States at the GRF; (4) there was no information at the time of the 2006 NPDES permit
15 issuance regarding the operational aspects of the GRF and the impacts on the Latham Plant; (5)
16 other NPDES permits allow brine discharge to be blended at the outfalls; (6) there was no need to
17 establish discharge criteria to establish a monitoring program for the GRF.

18 On December 10, 2009, David W. Gibson, the Executive Officer of the Regional Board
19 issued a letter denying the request for permit modification. *See* Exhibit B. No public hearing on
20 this matter occurred prior to the issuance of this decision.

21 On December 16, 2009, the Regional Board held a public meeting and Regional Board staff
22 gave a status update on the request for permit modification. The matter was not listed as an agenda
23 item for discussion, only as a matter of information. SOCWA spoke briefly at this meeting and
24 requested that the matter be subject to a full hearing so that it could be duly considered by the
25 Regional Board. The Regional Board verbally denied this request, and no further action was taken
26 on the item. SOCWA and SCWD contend that all actions and inactions of the Regional Board
27 described below are not supported by adequate findings or evidence in the record and are
28 inconsistent with Water Code §§ 13385 and 13241.

1 **IX. A PERMIT MODIFICATION WAS APPROPRIATE**

2 A permit modification may be triggered in several ways. For example, a staff person at one
3 of the Regional Boards conducting an inspection of a facility that finds a need for the modification
4 (i.e., the improper classification of an industry, new treatment process, new waste stream), or
5 information submitted by the discharger may suggest the need for a change. See 40 C.F.R. §122.62.
6 Other circumstances dictate and in fact require modification of a permit. These conditions include:

- 7
- To correct technical mistakes, such as errors in calculation, or mistaken
8 interpretations of law made in determining permit conditions,
9
 - New information not available at the time of permit issuance (other than
10 revised regulations, guidance, or test methods) justifies new permit
11 conditions. See 40 C.F.R. §122.62(a).
12
- 13

14 As set forth herein, SOCWA and SCWD contend that the above circumstances require that
15 the 2006 NPDES Permit be modified.

16 **X. BASIS FOR GRANTING REVIEW**

17 **A. MISTAKE OF LAW - THE 2006 NPDES PERMIT ERRONEOUSLY**
18 **APPLIES THE OCEAN PLAN STANDARDS TO THE GRF**

19 The 2006 NPDES permit erroneously treats the GRF as a POTW and/or industrial
20 discharger. The 2006 NPDES permit establishes effluent limitations for the GRF based on Table A
21 of the Ocean Plan which are the default standards that "apply only to publicly owned treatment
22 works and industrial discharges for which effluent limitations guidelines have not been established
23 pursuant to sections 301, 302, 304, or 306 of the federal clean water act."⁶ Ocean Plan, at 1. The
24 GRF, however, is neither a POTW nor an industrial discharger.

25 Unlike a POTW, the GRF does not treat municipal sewage, storm water runoff or any waste
26 water whatsoever. Nor is it a method or system for preventing, abating, reducing, storing, treating,
27 separating, or disposing of municipal waste, including storm water runoff, or industrial waste,

28 ⁶ As of the date of this Petition, such guidelines have still not been set.

1 including waste in combined storm water and sanitary sewer systems. It simply extracts local
2 groundwater, normally unusable due to its brackish nature, and filters and treats the water for
3 potable use.

4 The GRF likewise does not qualify as an industrial discharger. The California Porter-
5 Cologne Water Quality Control Act does not provide a definition for an "industrial discharger,"
6 however, the regulation implementing NPDES fees provides that:

7 NPDES permitted industrial discharger(s) means those industries identified in the
8 Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended
9 and supplemented, under the category "Division D -Manufacturing" and such other
10 classes of significant waste producers as, by regulation, the U.S. EPA Administrator
11 deems appropriate. (33 U.S.C. Sec. 1362).

12 13 C.C.R. § 2200, fn 8. This regulation refers to the Federal Clean Water Act ("CWA") which uses
13 the term "industrial users":

14 (18) The term "industrial user" means those industries identified in the Standard
15 Industrial Classification Manual, Bureau of the Budget, 1967, as amended and
16 supplemented, under the category of "Division D -Manufacturing" and such other
17 classes of significant waste producers as, by regulation, the Administrator deems
18 appropriate.

19 33 U.S.C. §1362.

20 The CWA also refers to "industrial discharges" in the context of municipal and industrial
21 stormwater discharge and requires that the "[p]ermits for discharges associated with industrial
22 activity shall meet all applicable provisions of this section and section 1311 of this title." 33 U.S.C.
23 § 1342(p)(3)(a). The CWA regulations defines an "industrial discharger," as "any source of
24 nondomestic pollutants regulated under section 307(b) of the [CWA] which discharges into a
25 POTW." 40 C.F.R. § 125.58.

26 The GRF does not fit within any of these definitions. The GRF does not fall within any of
27 the industries identified by the CWA or generate discharge as a result of any "industrial activity."
28 Furthermore, as discussed above, prior to the implementation of the sewer diversion, the GRF

1 discharged its brine effluent to the SJCOO, and thus, it did not qualify as a "source of nondomestic
2 pollutants . . . which discharges into a POTW." See 40 C.F.R. § 125.58. The GRF does not add or
3 generate any waste; rather, it simply extracts brackish and otherwise unusable groundwater and
4 filters and treats the water for potable use. The GRF's brine effluent is merely a concentrated form
5 of the natural constituents in the groundwater that is removed to obtain potable water from an
6 existing resource.

7 In its denial of SOCWA and SCWD's Request for Permit Modification, Regional Board
8 staff articulates several reasons for its treatment of the GRF as an "industrial discharger": (1) the
9 Regional Board has historically considered brine discharges to be industrial discharges; (2) because
10 EPA has not promulgated Effluent Limitation Guidelines ("ELGs") for brine discharges, the Ocean
11 Plan applies; (3) the brine discharge from Poseidon Resources Corporation was determined to be an
12 industrial discharge during the permitting process; and (4) in August 2005, the State Board made
13 available a *draft* NPDES Permit Development Guide which classifies water treatment facilities as
14 industrial facilities.

15 Regional Board staff completely misses SOCWA and SCWD's point here. SOCWA and
16 SCWD do not dispute that facilities like the GRF may have historically been considered and/or
17 classified as industrial dischargers. SOCWA and SCWD argue that this classification is simply
18 wrong. Merely because something is considered "customary" does not mean it is correct, legal or
19 logical. Moreover, if Regional Board staff relied on a *draft* guide which was never adopted by the
20 State Board this action may amount to an abuse of discretion since such a document has no force or
21 binding effect.⁷ As discussed above, the law does not define potable water treatment facilities like
22 the GRF as industrial dischargers and any such interpretation to that effect is inconsistent with state
23 and federal statutes. Alternatively, to the extent the statutory language is deemed ambiguous,
24 SOCWA and SCWD submit that an interpretation that classifies POTWs as industrial dischargers is
25 repugnant to public policy. See *Bollinger v. San Diego Civil Serv. Com.*, 71 Cal. App. 4th 568, 572

26
27 ⁷ It appears that Regional Board staff relies on this draft NPDES Permit Development Guide to
28 "assist Regional Water Board permit writers in developing appropriate permit language,"
notwithstanding staff's recognition that the draft guidance "was never finalized." See Exhibit I
(Email from Brian Kelley to Patricia J. Chen dated January 5, 2010).

1 (1999) ("When the language is susceptible of more than one reasonable interpretation, however, we
2 look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be
3 remedied, the legislative history, public policy, contemporaneous administrative construction, and
4 the statutory scheme of which the statute is a part.") Given the current water shortage in California
5 and the need for reliable local water sources and the fact that the GRF discharges brine which is
6 comprised of the natural constituents in the brackish groundwater, the Regional Board's treatment
7 of the GRF as an industrial discharger and application by default of the Ocean Plan standards
8 simply does not make sense and should not be sustained.

9 In sum, there is simply no indication that potable water treatment facilities like the GRF
10 which are relatively uncommon types of facilities, were intended to, or should, fall within the
11 definition of an "industrial discharger" subjected to the Ocean Plan. Thus, application of the Ocean
12 Plan standards to the GRF by the Regional Board is improper, not supported by the law, arbitrary
13 and capricious. As such, SOCWA and SCWD submit that the 2006 NPDES Permit should have
14 been modified to correct this misinterpretation of law.

15 **B. MISTAKE OF LAW – THE CHANGES IN THE 2006 NPDES PERMIT**
16 **RESULTED FROM A MISINTERPRETATION OF EPA'S POSITION WITH**
17 **RESPECT TO POTWS**

18 The change to a different monitoring point by the Regional Board was based on a
19 misinterpretation of the United States EPA's position on the issue as expressed below. The change
20 in monitoring location was a Regional Board staff decision made after the start of construction of
21 the GRF and was asserted by Regional Board staff to be supported by EPA. However, it is clear
22 that EPA's concern was with POTWs:

23 We understand that the discharger prefers the point of compliance be
24 determined at the outfall, however we support the Regional Board's
25 determination that compliance should be determined at the individual
26 treatment plants. Secondary treatment is a technology-based standard
and should be met after the treatment process. According to the Clean
Water Act (CWA), all [POTWs] must meet effluent limitations for
secondary treatment

27 Exhibit A, Attachment 3 (Letter from Douglas E. Eberhardt (EPA, Region 9) to David Hanson
28 dated December 8, 2004).

1 EPA did not make any observations with respect to the GRF, which is clearly not a POTW.
2 Accordingly, the 2006 NPDES Permit states in pertinent part: "Effluent monitoring has been
3 required for each of the wastewater treatment plants prior to discharge into the Ocean Outfall
4 collection system to determine compliance with the applicable technology-based effluent
5 limitations, including the percent removal requirements for POTWs." 2006 NPDES Permit at F-44.
6 Such technology-based effluent limitations are referenced as those "...technology-based standards
7 for POTW performance . . . promulgated at 40 CFR Part 133 and expressed as 30-day averages and
8 7-day averages for BOD5, CBODs and TSS...." *Id.* at F-41.

9 Regional Board staff appears to have misinterpreted EPA's support for POTW compliance
10 to extend to all facilities subject to the 2006 NPDES permit, including the GRF. In its denial of
11 SOCWA and SCWD's Request for Permit Modification, Regional Board staff cites to the sentence
12 in EPA's letter which states: "technology-based requirements are to be met with treatment
13 technology, not non-treatment such as flow augmentation (40CFR125.3(f)) or dilution that could
14 occur as various effluents mix in the outfall." Exhibit B, p. 3. Regional Board staff, however, takes
15 this sentence out of context. The full paragraph reads:

16 "Determining compliance with secondary treatment requirements only at the
17 outfall is inappropriate because the outfall does not meet the definition of a
18 POTW. A POTW is defined in 40 CFR 122.2 and 403.3 as 'any system used in
19 the storage, treatment, recycling and reclamation of municipal sewage or
20 industrial wastes of a liquid nature. It also includes sewers, pipes and other
21 conveyances only if they convey waste to a POTW Treatment Plant.' Because the
22 [Aliso Creek outfall] does not convey waste to a treatment plant, the outfall is not
23 included within the definition of a treatment plant. Thus, the effluent should be
24 measured and compliance determined subsequent to secondary treatment at each
25 treatment plant. Furthermore, *technology-based requirements are to be met with*
26 *treatment technology, not non-treatment such as flow augmentation*
27 *(40CFR125.3(f)) or dilution that could occur as various effluents mix in the*
28 *outfall.*" (Exhibit A, Attachment 3, pp. 1-2 (emphasis added))

1 It is clear that the last sentence refers to the POTW effluent, and not any other type of effluent.

2 This erroneous and arbitrary and capricious application of EPA policy to the GRF is not
3 supported by law and should not be sustained. As such, SOCWA and SCWD submit that the 2006
4 NPDES permit should be modified to correct this misinterpretation of EPA's position with respect
5 to POTWs.

6 C. MISTAKE OF LAW – THERE IS NO DISCHARGE TO THE WATERS OF
7 THE UNITED STATES AT THE GRF

8 Prior to redirecting the brine effluent to the Latham Plant and as designed, the GRF
9 discharged brine effluent via a 18" PVC line into the Chiquita Land Outfall which is a 42" ductile
10 iron pipeline at the point of connection to the GRF. In turn, the Chiquita Land Outfall pipeline joins
11 with the SJCOO upstream of the SJCOO. As such, the GRF discharge never entered any water
12 body, let alone the waters of the United States, until it reached the very end of the SJCOO.

13 The CWA does not regulate effluent until it is discharged into "waters of the United States."
14 This is demonstrated by the CWA definition for "effluent limitation" which is "any restriction . . .
15 on quantities, discharge rates, and concentrations of pollutants which are discharged from point
16 sources into waters of the United States, the water of the continuous zone, or the ocean." 40 C.F.R.
17 § 122.2.

18 Further, "discharge" is defined as "[a]ny addition of any 'pollutant' or combination of
19 pollutants to 'waters of the United States' from any 'point source.' 40 C.F.R. § 122.2. The CWA
20 defines the term "waters of the United States" as "navigable water" meaning "the waters of the
21 United States, including the territorial seas." 33 U.S.C. § 1362(7). Therefore, both definitions limit
22 regulation to effluent discharged into waters of the United States, showing that the CWA does not
23 regulate effluent unless and until it reaches those waters.

24 The Supreme Court's decision in the consolidated cases of *Rapanos v. United States* and
25 *Carabell v. United States*, 547 U.S. 715 (2006) (herein referred to simply as "*Rapanos*") further
26 addressed the jurisdiction over waters of the United States under the CWA. Four justices, in a
27 plurality opinion authored by Justice Scalia, rejected the argument that the term "waters of the
28 United States" is limited to only those waters that are navigable in the traditional sense and their

1 abutting wetlands. *Rapanos*, 547 U.S. at 717. The plurality concluded that the agencies' regulatory
2 authority should extend only to "relatively permanent, standing or continuously flowing bodies of
3 water" connected to traditional navigable waters, and to "wetlands with a continuous surface
4 connection to" such relatively permanent waters. *Id.* It is clear that empowered agencies can and
5 do assert jurisdiction over "non-navigable tributaries" of traditional navigable waters that are
6 relatively permanent where the tributaries typically flow year-round or have continuous flow at least
7 seasonally (e.g., typically three months). A "tributary" includes natural, man-altered, or man-made
8 water bodies that carry flow directly or indirectly into a traditional navigable water. A "tributary"
9 includes natural, man-altered, or man-made water bodies that carry flow directly or indirectly into a
10 traditional navigable water. *Clean Water Act Jurisdiction Following the U.S. Supreme Court's*
11 *Decision in Rapanos v. United States & Carabell v. United States*, USEPA, December 02, 2008,
12 page 6, fn 24.

13 Even under these broad definitions, the pipeline carrying the brine discharge is not a
14 "navigable water," "non-navigable tributary," or "water body" by any stretch of the imagination.
15 Further the "discharge" to waters of the United States occurs at the SJCOO, not at the 2006 NPDES
16 permit mandated monitoring point, i.e., the GRF. Therefore, the 2006 NPDES permit should not
17 have imposed effluent limitations at the GRF.

18 Further, because the GRF effluent only travels through pipelines until it reaches the SJCOO,
19 the GRF effluent is not discharged into "waters of the United States," and it not subject to CWA
20 effluent limitations for discharge until it reaches the SJCOO.

21 The Regional Board, in rejecting SOCWA's request to modify the 2006 NPDES permit, did
22 not specifically deny that the GRF effluent is not discharged into waters of the United States until it
23 reaches the ocean SJCOO. Instead, the Regional Board merely asserts that TBELs must be applied
24 to each treatment facility prior to any mixing with other effluents or dilution with receiving water in
25 accordance with applicable federal NPDES regulations at 40 C.F.R. § 125.3(f). This does not
26 address the position of SOCWA in any way and merely is a redundant misapplication of the law.

27 The position by the Regional Board is erroneous, arbitrary and capricious and is not
28 supported by law and should not be sustained.

1 D. NEW INFORMATION – THERE WAS NO INFORMATION AT THE TIME
2 OF THE 2006 NPDES PERMIT ISSUANCE REGARDING THE
3 OPERATIONAL ASPECTS OF THE GRF

4 At the time of the 2006 NPDES permit issuance, construction of the GRF was not complete
5 and it was unclear how the GRF would perform in light of the poor groundwater quality. It was
6 also unclear whether the GRF could meet the effluent limits imposed by the permit.

7 Between June 2007 and February 2008, Eco Resources, Inc. operated the GRF. During this
8 period, the facility was operating only sporadically as adjustments were made to the operations to
9 address start up issues including the sampling of effluent. For example, in December 2007, the total
10 runtime of the facility was approximately 4.97 days and in January 2008, the GRF had a total
11 runtime of approximately 4.75 days. The facility began 24/7 operations in approximately March 5,
12 2008, and even after that date, the GRF had periods of shut down due to equipment issues.

13 SCWD was aware of exceedances of the 2006 NPDES permit for total suspended solids,
14 settleable solids, and turbidity during the start up period, but it did not know if it was an operational
15 issue or a sampling issue. For example, in September 2007, SOCWA reported to the Regional
16 Board that the test results for August 2007 “were substantially higher than the feed water from the
17 source well.” In October 2007, SOCWA reported to the Regional Board that SCWD had
18 redesigned the sampling location at the GRF to obtain more representative samples of the discharge
19 and that the facility had been “off-line since the change to the sampling location.”

20 In the December 2007 time period, it became clear that the quality of the brackish water
21 from the basin was going to routinely result in a brine discharge with remarkably higher total
22 suspended solids than previously expected. This new information led SCWD to develop an interim
23 solution - the installation of a holding tank and diversion of the brine flow via pipe to the sewer
24 system for disposal through the Latham Plant at a cost of over \$200,000.

25 The failure to recognize that the request for modification was appropriate given the changed
26 circumstances is erroneous, arbitrary and capricious and is not supported by law and should not be
27 sustained.

28

1 E. NEW INFORMATION – IMPACT OF GRF’S BRINE DISCHARGE ON THE
2 LATHAM PLANT

3 To mitigate the severe water shortage in Southern California, SOCWA has engaged in
4 ongoing efforts to explore and implement AWT projects for its member agencies at Latham Plant.
5 One such project under consideration is the construction of a 7.0 million gpd tertiary treatment
6 facility at the Latham Plant to provide a sustainable source of recycled water. This recycled water
7 project would be an important link in the potable water resource chain for South Orange County
8 because, like SCWD’s GRF, it will significantly reduce the need to import water into the region
9 from great distances.

10 The diversion of the brine from the GRF to the sewer system contributes an additional 200
11 mg/l to the Latham Plant’s effluent total dissolved solids concentration. The SCWD GRF brine
12 discharge to the Latham Plant will result in high concentrations of TDS affecting the quality of
13 recycled water to be produced by the planned recycled water project. This situation will be
14 exacerbated with the introduction of the planned next phase of the GRF which will increase its
15 capacity. Consequently, limitations on the amount of brine the GRF can divert to the Latham Plant
16 will affect the amount of brackish groundwater which may be processed by the GRF. In other
17 words, diversion of the brine to the sewer not only affects the ability of the Latham Plant to produce
18 recycled water, it also affects the local water supply infrastructure by reducing the amount of
19 potable water produced by the GRF. This unintended consequence contravenes the State Board’s
20 Recycled Water Policy (adopted February 3, 2009). In its Recycled Water Policy, the State Board
21 declared that it “will achieve [its] mission to ‘preserve, enhance and restore the quality of
22 California’s water resources to the benefit of present and future generations,’” and it “strongly
23 encourage[s] local and regional water agencies to move toward clean, abundant, local water for
24 California by emphasizing appropriate water recycling, water conservation, and maintenance of
25 supply infrastructure and the use of stormwater (including dry-weather urban runoff)”

26 In stark contrast, discharge of the GRF brine effluent to the SJCOO did not and would not
27 result in any significant environmental impact or compromise any recycled water project. Note that
28 abatement of the GRF’s brine discharge to the SJCOO does not result in compliance at the SJCOO

1 because the SJCOO was in compliance even with the brine effluent. The GRF's contribution of
2 TSS to the SJCOO was approximately 1.1 mg/l. The average outfall TSS concentration over the
3 period of GRF discharge was 11.5 mg/l which was well under the standard permit limit of 30 mg/l.
4 See eGIS Letter (Exhibit A, Attachment 2). Therefore, the GRF's contribution to the SJCOO was
5 nominal and did not result in any significant environmental impact.

6 The brackish water pumped by the GRF represents the final opportunity for the region to
7 collect, treat, and reuse the underlying San Juan Basin groundwater for potable purposes, before the
8 water flows underground to the Pacific Ocean. It simply does not make sense to discharge the brine
9 from the water to the sewer where it must be processed and it will result in highly salinic recycled
10 water when in the absence of the GRF, the brackish groundwater would reach the ocean naturally.

11 In response to this uncontroverted information, Regional Board staff simply argues that
12 diverting the GRF brine discharge to the Latham Plant "is by no means the only method of
13 compliance available to SOCWA." In assessing potential solutions to the issue, SCWD determined
14 that diverting the brine discharge was the only feasible interim solution given the cost of removing
15 the iron and manganese from the brackish groundwater. SCWD engineers estimated a cost of \$2.85
16 million to install an iron and manganese removal system to treat the entire well production. This
17 would make operation of the GRF financially infeasible. Currently, it costs SCWD approximately
18 \$1,700 per acre foot to produce water at the GRF rather than to purchase the water from MWD at a
19 cost of \$701 per acre foot. Even with the \$250 per acre foot subsidy from MWD, the cost to
20 produce water at the GRF significantly exceeds the cost to simply purchase the water. If SCWD is
21 required to install additional (and in SCWD's view, unnecessary) treatment, SCWD would be
22 forced to close the GRF, creating a waste of over a \$5 million investment. Obviously, its Phase II
23 expansion would be curtailed as well.

24 Regional Board staff's rigid application of the Ocean Plan standards to the GRF is short-
25 sighted, impractical, and fails to consider the environmental impact of the potential reduced
26 production of potable and recycled water. As such, the Regional Board's denial of the Request for
27 Permit Modification was arbitrary and capricious and contrary to public policy.

28 ///

1 F. INCONSISTENT AND ARBITRARY APPLICATION OF LAW - OTHER
2 NPDES PERMITS ALLOW BRINE DISCHARGES TO BE BLENDED AT
3 OUTFALLS

4 The arbitrariness of the Regional Board's policy requiring SCWD to sample at the GRF is
5 further demonstrated by the fact that it has not been consistently executed by this Regional Board or
6 other regional boards in the state. The Central Coast Regional Board, in particular, has made it very
7 clear that its policy is to promote the benefits of recycled water production by specifically diverting
8 brines directly to POTW outfalls where commingled discharge is monitored for compliance with the
9 Ocean Plan.

10 a. **Oceanside**

11 The City of Oceanside operates a Brackish Groundwater Desalination Facility ("BGDF")
12 that treats groundwater extracted from the Mission Hydrologic Subarea for potable uses. The
13 facility provides treatment consisting of pH adjustment, filtration, and demineralization by reverse
14 osmosis. The BGDF disposes waste brine to the Oceanside Ocean Outfall ("OOO") under NPDES
15 Permit CA0107433 (Order Number R9-2005-0136) ("Oceanside Permit"), which is managed by the
16 Regional Board. Waste effluent from the San Luis Rey Wastewater Treatment Plant (SLRWTP)
17 and La Salina Wastewater Treatment Plants (LSWTP) is also discharged to the OOO under this
18 NPDES permit. Discharges from these facilities and the BGDF are also commingled with discharge
19 from the Fallbrook Public Utility District, U.S. Marine Corps Base Camp Pendleton and the Biogen
20 IDEC Pharmaceuticals Corporation. *See* eGIS Letter at 9 (Exhibit A, Attachment 2).

21 Unlike the outfall monitoring requirements for the SCWD GRF, brine effluent to the OOO is
22 not monitored directly from the BGDF. Instead, monitoring location M-003 characterizes the
23 comingled effluent from the numerous contributors to the OOO including the BGDF. In other
24 words, the waste brine is monitored at the outfall rather than the facility, exactly the condition
25 described in the 2000 NPDES Permit under which the SCWD GRF was designed, yet the BGDF
26 can clearly operate without any violation.

27 ///

28 ///

1 **b. Monterey**

2 The Monterey Regional Water Pollution Control Agency (MRWPCA) discharges up to 81.2
3 MGD of secondary treated wastewater and brine waste from its Regional Treatment Plant (RTP) to
4 the Monterey Bay via the a diffuser approximately 11,260 feet offshore. This discharge is
5 performed under NPDES permit CA004851 (Order R3-2008-0008) ("Monterey Permit") issued by
6 the Central Coast Regional Board. According to the NPDES documents, regional, commercial, and
7 industrial wastewater is conveyed to the RTP, which is treated and comprises the majority of the
8 secondary treated wastewater. The MRWPCA also accepts 30,000 to 50,000 gallons per day of
9 brine wastes that include softener regenerant waste, groundwater nitrate removal brine and reverse
10 osmosis brines. These brines are trucked to the RTP from businesses that would otherwise dispose
11 these wastes to the sanitary sewer. The brines wastes are held at the RTP in a 375,000-gallon, lined
12 holding pond and are ultimately discharged or blended with secondary treated wastewater from the
13 RTP before being discharged to the diffuser. As such, like the Oceanside BGDF, the brine wastes
14 are discharged to the outfall. *See* eGIS Letter at 7-8 (Exhibit A, Attachment 2).

15 The Monterey Permit further clarifies that "brine waste samples shall be collected as grab
16 samples and manually composited per the Discharger's current brine waste and outfall facility
17 configuration and sampling protocols." *See* eGIS Letter at 8 (Exhibit A, Attachment 2). Based on
18 this information and the monitoring points identified in the NPDES documentation, although brine
19 influent is sampled, brine effluent from the RTP is not monitored individually, but is instead
20 monitored as part of the total blended effluent at location EFF-001. *Id.* Sampling of brine is
21 conducted solely to determine how much of the blended secondary effluent is needed so that
22 discharges to the outfall will meet permit conditions. Furthermore, as noted in the Monterey
23 Permit, during the dry season the facility "is recycling essentially 100% the wastewater flow less
24 what is needed for blending with brine wastes." *Id.* Under this permit, the facility blends secondary
25 treated effluent with brine as needed to meet the permit conditions for brine waste discharges. The
26 permit contains a single set of water quality based effluent limitations (WQBELS) that are
27 consistent with the Ocean Plan and applicable to any ratio of blended secondary effluent and brine
28 waste flows, and dictate the amount of secondary effluent required for blending with brine waste.

1 *Id.*

2 Moreover, it is not unprecedented for a groundwater recovery facility to be held to a
3 different standard from POTWs and other industrial discharges. For example, Lower Sweetwater
4 River Basin Groundwater Demineralization Plant (NPDES Permit CA0108952, Order No. R9-
5 2004-0111) discharges brine concentrate from a reverse osmosis system and the discharge is
6 considered "innocuous nonmunicipal wastewaters." Clearly, flexibility exists to address situations
7 like this. The brine discharge from a groundwater recovery facility should not be cast in the same
8 category as industrial process waste, and the focus should be on protection of the beneficial uses of
9 the receiving water. Discharge of the brine effluent from the GRF to the SJCOO simply does not
10 compromise the beneficial uses of the receiving waters from the outfall and as such, it should have
11 been allowed.

12 While the Regional Board staff recognized this inconsistency of its application of TBELs in
13 its jurisdiction, it completely ignored the Monterey Permit. Moreover, with respect to the Regional
14 Board's internal inconsistency, it simply states that the Regional Board would be changing this
15 NPDES permit to correctly implement TBELs at the facility. This lack of analysis is indicative of
16 Regional Board staff's cursory review of this matter and its unwillingness to examine the critical
17 issues raised by SOCWA and SCWD, particularly on a statewide level. In doing so, it acted
18 arbitrarily and capriciously and abused its discretion.

19 **XI. CONCLUSION**

20 The GRF is neither a POTW nor an industrial discharger. It simply extracts brackish local
21 groundwater and treats it for potable use. Given the State's severe water shortage, the GRF is the
22 very type of facility that is encouraged by the Regional and State Boards. The GRF does not treat
23 wastewater, or create discharge from industrial processes. As such, it should not be treated like a
24 POTW or an industrial discharger, i.e., it should not be subject to the standards set forth in the
25 Ocean Plan. Moreover, the GRF simply does not discharge into "Waters of the United States," and
26 thus, it should not be subject to effluent limitations under the Clean Water Act. The appropriate
27 point of compliance is at the SJCOO where the effluent does, in fact, discharge to "Waters of the
28 United States." Because the brine effluent from the GRF would not impact the SJCOO and the

1 brine discharge would enter the ocean (which is naturally saline), it is clearly the best facility to
2 receive the brine effluent. This makes much more sense than discharging the brine to the Latham
3 Plant which was not designed to treat brine effluent. As such, SOCWA and SCWD respectfully
4 request that the State Board reverse the Regional Board's denial of SOCWA and SCWD's Request
5 for Permit Modification and impose effluent limits at the SJCOO rather than at the GRF.

6
7 Date: January 8, 2010

Respectfully submitted,

MILES • CHEN LAW GROUP, P.C.

8
9
10 By: Pat Chen
Patricia J. Chen

11 Date: January 8, 2010

BROWNSTEIN HYATT FARBER
SCHRECK, LLP

12
13
14 By: Steven L. Hoch
Steven L. Hoch
Kari N. Vozenilek

EXHIBIT A



South Orange County Wastewater Authority

Mr. John Robertus
Executive Officer
Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4353

Re: REQUEST FOR PERMIT MODIFICATION by South Orange County Wastewater Authority
Waste Discharge Requirement Order R9-2006-0054 NPDES Permit NO. CA0107417 for
the San Juan Creek Ocean Outfall

Dear Mr. Robertus:

We are in receipt of the email from Michael McCann written on your behalf dated October 19, 2009 and we understand that the Regional Board is currently reviewing the appropriateness and consistency of its application of the Table A Effluent Limitations to brine discharges within the Regional Board's jurisdiction. We very much appreciate your time and attention on this matter. Although you have suggested that we should hold off on submitting a formal request for modification of NPDES Permit NO. CA0107417 (the "2006 NPDES Permit") pending your review of this matter, we believe that in performing the review, the Regional Board should be aware of and give due consideration to South Orange County Wastewater Authority ("SOCWA") and South Coast Water District's ("SCWD") position on the issues. Furthermore, time is of the essence for SCWD as it is currently in the process of assessing expansion of the groundwater recovery facility ("GRF") in order to fulfill SCWD's mission to mitigate the water shortage in the State and particularly Southern California. Since discharging the brine effluent to the Latham Plant is not a viable long term solution given the effects on SOCWA's recycled water project, SCWD must obtain a permit modification prior to moving forward on expanding the GRF. As such, it is critical for us to move this permit modification request process forward as expeditiously as possible.

As you know, the 2006 NPDES Permit sets certain discharge levels and monitoring points for brine discharge from SCWD's GRF. These discharge limitations and monitoring points were not in existence under the former permit in force during the time the GRF was being planned and constructed. Both SOCWA and SCWD objected to the permit changes to no avail. Unfortunately, once the GRF began operations, it became clear that it could not meet these standards and Mandatory Minimum Penalties ("MMPs") were assessed. In hearings before the Board on May 13, 2009 and July 1, 2009 regarding the MMPs, several members of the Board recognized that SOCWA could (and should) seek relief via a permit modification.

In that spirit, SOCWA attempted to engage your staff through correspondence and telephone calls. However, we recently received a voicemail from Melissa Valdovinos informing us that based on a finding by the State Board that technically based effluent limits ("TBELs") apply to the GRF, Regional Board staff is not interested in opening up the NPDES permit to change the compliance points for the GRF. We believe this decision is incorrect under the both federal and state law, fails to take into account the facts and is otherwise arbitrary and capricious. It appears that the Regional Board may now be revisiting this decision and we certainly encouraged by the fact that you have initiated a review of these issues.

34156 Del Obispo Street • Dana Point, CA 92629 • Phone: (949) 234-5400 • Fax: (949) 489-0130 • Website: www.socwa.com

A public agency created by: CITY OF LAGUNA BEACH • CITY OF SAN CLEMENTE • CITY OF SAN JUAN CAPISTRANO • EL TORO WATER DISTRICT • EMERALD BAY SERVICE DISTRICT
IRVINE RANCH WATER DISTRICT • MOULTON NIGUEL WATER DISTRICT • SANTA MARGARITA WATER DISTRICT • SOUTH COAST WATER DISTRICT • TRABUCO CANYON WATER DISTRICT

Mr. John Robertus
October 29, 2009
Page 2 of 2

Attached is our formal request for modification of the 2006 NPDES Permit. We request that our request for modification be included as an agenda item for the December 2009 Regional Board meeting. Should the Regional Board issue a written opinion in our favor prior to this meeting, the item may be removed from the agenda.

If you have any questions or need any further information, please feel free to contact me.

Sincerely,

SOUTH ORANGE COUNTY WASTEWATER AUTHORITY



Thomas R. Rosales
General Manager

cc: Members of the Regional Board (Via email and US Mail)
Michael McCann, RWQCB
Steve Hoch, BHFS
Pat Giannone, BAWG
Pat Chen, Miles Chen Law Group
Betty Burnett, SCWD

REQUEST FOR PERMIT MODIFICATION

**Waste Discharge Requirement Order R9-2006-0054
NPDES Permit NO. CA0107417
for the San Juan Creek Ocean Outfall**

**On behalf of
South Orange County Wastewater Authority
South Coast Water District**

Submitted by:

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ANALYSIS

Executive Summary

South Orange County Wastewater Authority ("SOCWA") presently holds National Pollutant Discharge Elimination System ("NPDES") Permit No. CA0107417 (Order Number R9-2006-0054, August 16, 2006) ("2006 NPDES Permit") for the San Juan Creek Ocean Outfall ("SJCOO"), which serves the JB Latham Wastewater Treatment Plant ("Latham Plant"), a Publically Owned Treatment Work (POTW).¹ South Coast Water District ("SCWD"), a member agency of SOCWA, operates a Groundwater Recovery Facility ("GRF") that is subject to the permit. The GRF takes previously unusable highly brackish groundwater and by applying reverse osmosis ("RO") creates usable potable water.

The GRF was designed under the preceding permit NPDES Permit No. CA 0104717 (Order Number R9-2000-0013, April 12, 2000) ("2000 NPDES Permit") which permitted the GRF brine to be discharged to the Chiquita Land Outfall to the South East Reclamation Regional Authority ("SERRA") Ocean Outfall which is now referenced only as the SJCOO. Under the 2000 NPDES Permit, the discharge monitoring of the GRF brine occurred after the intersection and commingling of effluent from several outfall lines, the Chiquita Land Outfall, the SJCOO and the San Clemente Outfall line. The blending of the GRF brine is appropriate with the secondary effluent of the Chiquita Land Outfall line because the constituents of the brine are natural salts that have no connection to domestic sewage treatment or industrial wastes typical in the wastewater treatment environment.

Pursuant to the 2000 NPDES Permit there was no requirement to monitor the GRF discharge upstream of the intersection into the SJCOO pipeline. In August 2006, the San Diego Regional Water Quality Control Board ("Regional Board") issued the 2006 NPDES Permit, effective October 2006. The 2006 NPDES Permit changed the point of monitoring to the GRF itself. Because the GRF was designed based on the 2000 NPDES Permit, the GRF could not meet the requirement set for the discharge at the facility (as opposed to at the SJCOO) despite SCWD's attempts to modify operations and sampling at the GRF. As a result, SCWD spent over \$200,000 to move the discharge into the sewer system, which diverted the brine into the Latham Plant rather than the SJCOO.² This solution actually produces substantial negative consequences, including limiting SCWD's production of potable drinking water from brackish groundwater and introducing the brine into the sewer system, which in turn will reduce SOCWA's ability to supply recycled water from the Latham Plant.

SOCWA and SCWD assert that the change in monitoring point imposed in the 2006 NPDES Permit was based on the mistaken application of technical standards and mistaken interpretations of law. Furthermore, new information not available at the time of permit issuance justifies new permit conditions. The basis for this assertion includes the following:

- ▶ The 2006 NPDES permit erroneously applies the Ocean Plan standards to the GRF;
- ▶ Changes in the 2006 NPDES permit resulted from a misinterpretation of EPA's position with respect to POTWs;
- ▶ There is no discharge to waters of the United States at the GRF;

¹ The Latham Plant is located at 34156 Del Obispo, Dana Point, CA 92629

² On or about February 27, 2009, the Regional Board issued the ACL Complaint No. R9-2009-0028 ("ACLC") which imposed mandatory minimum penalties ("MMPs") on SOCWA and SCWD for violations of the 2006 NPDES Permit effluent limits for the GRF in the amount of \$204,000. The ACLC included all the purported violations at the GRF from August 2007 through implementation of the remedy in November 2008. SOCWA and SCWD have petitioned the State Water Resources Control Board (the "State Board") for review of the Regional Board's order.

- ▶ There was no information at the time of the 2006 NPDES permit issuance regarding the operational aspects of the GRF and the impacts on the Latham Plant; and
- ▶ There was no need to establish discharge criteria to establish a monitoring program for the GRF.

As such, under 40 C.F.R. §122.62, SOCWA and SCWD seek to have the 2006 NPDES Permit modified so that the monitoring requirements of the 2000 NPDES Permit are reinstated as applied to the GRF facility, i.e., the point of compliance for the GRF would be at the SJCOO rather than at the GRF. More specifically, the technology-based effluent limitation ("TBEL") should be met at the Ocean Outfall Monitoring Location M-001.³

³ While SOCWA and SCWD seek to modify the monitoring requirements as applied to the GRF, there is a basis for inclusion of other similar facilities.

I. Background

A. Parties

1. SOCWA

SOCWA is a Joint Powers Authority created on July 1, 2001 as a successor authority under the consolidation of three prior joint powers authorities, consisting of ten member agencies:

El Toro Water District
Emerald Bay Service District
Irvine Ranch Water District
Laguna Beach, City of
Moulton Niguel Water District

San Clemente, City of
South Coast Water District
San Juan Capistrano, City of
Santa Margarita Water District
Trabuco Canyon Water District

SOCWA's member agencies serve the following cities and areas:

Aliso Viejo
Ladera
Laguna Beach
Lake Forest
Coto de Caza
Laguna Woods
Las Flores
San Juan Capistrano
Laguna Niguel

Rancho Santa Margarita
San Clemente
Mission Viejo
Trabuco Canyon
Emerald Bay
Talega
Dana Point
Laguna Hills

SOCWA is the legal successor to the Aliso Water Management Agency, South East Regional Reclamation Authority and South Orange County Reclamation Authority. SOCWA's boundaries encompass approximately 220 square miles and include: Aliso Creek, Salt Creek, Laguna Canyon Creek and the San Juan Creek Watersheds. SOCWA's member agencies serve over 500,000 residents.

SOCWA's mission is to collect, test, beneficially reuse, and dispose of wastewater in an effective and economical manner. It acts in a manner that respects the environment, maintains the public's health and meets or exceeds all local, state and federal regulations for the mutual benefit of SOCWA's ten member agencies and the general public in South Orange County. SOCWA provides, at a minimum, full secondary treatment at all of its regional wastewater facilities, and also has active water recycling, industrial waste (pretreatment), biosolids management and ocean shoreline monitoring programs to meet the needs of its member agencies and the requirements of the applicable NPDES permits.

SOCWA holds the 2006 NPDES Permit for the SJCOO on behalf of five of its member agencies including SCWD, Santa Margarita Water District, Moulton Niguel Water District, City of San Clemente, and City of San Juan Capistrano

2. SCWD

SCWD is a retail water agency organized and existing as a County Water District under California Water Code Section 30000 *et seq.* SCWD serves approximately 12,500 water accounts with an estimated winter population of 40,000 in the South Laguna and Dana Point areas. Tourism adds an additional 2 million visitors to the SCWD service area on an annual basis. SCWD imports approximately 7,500 acre-feet (6.7 million gallons per day ("gpd")) of potable water annually. SCWD maintains approximately 32 million gallons of water storage in 14 area reservoirs (an approximately 4.8-day water supply). The SCWD service area has been identified by the Bureau of Reclamation as an area of "Potential Water Supply Crisis" by 2025. SCWD's wholesale water providers, the Municipal Water District of Orange

County ("MWDOC") and the Metropolitan Water District of Southern California ("MWD"), have encouraged the development of alternative local water supply sources within the area served by SCWD.⁴

B. The SJCOO

SOCWA owns and operates the SJCOO, which receives treated effluent from the following municipal wastewater treatment plants: the Latham Plant, the Santa Margarita Water District Chiquita Water Reclamation Plant, the Moulton Niguel Water District 3A Reclamation Plant and the City of San Clemente Reclamation Plant. In addition, a number of dry-weather nuisance discharges from a number of sources and brine discharges from the City of San Juan Capistrano and the SCWD are also routed to the SJCOO. The SJCOO extends 2 miles off Doheny Beach in Dana Point and has a permitted flow of 36.385 million gallons per day. The SJCOO is constructed of an extended bell and spigot reinforced concrete pipe, 57 inches in diameter, with a minimum wall thickness of 8 inches.

The SJCOO is governed by the requirements of the Water Quality Control Plan for Ocean Waters of California (the "Ocean Plan") for protection of the beneficial uses of the State ocean waters. The Ocean Plan has been amended numerous times. The State Water Resources Control Board ("State Board") adopted the latest amendment on April 21, 2005 which was approved by United States Environmental Protection Agency ("EPA") on February 14, 2006. The Ocean Plan is applicable, in its entirety, to point source discharges to the ocean.

C. The GRF

The GRF, as designed by SWCD, treats low quality brackish groundwater removed from the San Juan Creek Groundwater Basin to produce drinking water distributed to SCWD customers. This resource would otherwise remain unusable. The GRF water treatment process primarily consists of reverse osmosis ("RO") and iron/manganese removal. With the support of the MWD, SCWD spent \$5.8 million to construct the GRF and designed it **to produce approximately 10% of SCWD's potable water** in Phase I. The construction of the facility and associated groundwater rights are such that the GRF is planned for expansion in Phase II **to supply up to 20% of local potable water** needs using a local resource. The current requirement for disposal of brine to the sewer system imperils the planned Phase II expansion (which entails installing additional wells) because it is unclear whether the Latham Plant can handle the additional brine discharge from the additional wells. As discussed in more detail below, the salinity of the influent to the plant may compromise SOCWA's recycled water program at the Latham Plant.

As conceived, designed and originally built, the GRF's brine discharge was conveyed by an 18" PVC pipeline to the Chiquita Land Outfall which then commingled directly with other discharge sources at the SJCOO. Significantly, the brine discharge never entered any stream, lake, pond, ditch or other such body of water prior to the point of blending with the SJCOO.

1. GRF Permit History

a) The 2000 NPDES Permit

The 2000 NPDES Permit described the disposal of the waste stream from the planned GRF as the following: "...0.32 M [million] gallons/day will be discharged through the Chiquita Land Outfall to the [South East Reclamation Regional Authority] SERRA SJCOO." In addition to the GRF, the following additional facilities were included in the 2000 NPDES Permit for discharge to the SJCOO:

Latham Plant
City of San Clemente WRF

⁴ The MWD has also expressed support for SCWD's request for an amendment to the 2006 NPDES Permit to allow compliance to be determined at the SJCOO, rather than at the GRF. See Letter from Jeffrey Kightlinger, MWD, to Michael P. McCann dated October 27, 2008 (attached as Attachment 1)

SMWD Chiquita Water Reclamation Plant
Moulton Niguel Water District 3A Reclamation Plant
Santa Marguerita Water District Oso Creek WRP

According to the "Monitoring and Sampling Plan" included in the 2000 NPDES Permit, the combined effluent from the above facilities was sampled at a point "...downstream of any in-plant return flows, and disinfection units, where representative samples of the effluent discharged through the ocean outfall can be obtained."

b) The 2006 NPDES Permit

The GRF was designed in the 2001-2002 timeframe to be compliant with the 2000 NPDES Permit. According to the 2000 NPDES Permit, the requirements for effluent discharge from the SJCOO are based on the 1997 California Ocean Plan.⁵ The 2000 NPDES Permit allowed disposal of facility effluent to the ocean via the SJCOO and required sampling at the SJCOO. It took two years to construct the GRF beginning in approximately June 2005. In 2006, protracted negotiations with the RWQCB occurred with respect to the 2000 NPDES Permit renewal, and in August 2006, the RWQCB issued the 2006 NPDES Permit, which required SOCWA and its member agencies to sample effluent at their respective facilities prior to discharging into the SJCOO.

The 2006 NPDES Permit establishes effluent limitations for the GRF based on Table A of the Ocean Plan. See 2006 NPDES Permit, at 13. These effluent limitations are the same for the SJCOO. According to the Ocean Plan, Table A effluent limitations are a "default" standard as they "apply only to publicly owned treatment works and industrial discharges for which Effluent Limitations Guidelines have not been established pursuant to Sections 301, 302, 304, or 306 of the Federal Clean Water Act." Ocean Plan at 1.⁶ However, the Ocean Plan fails to define either a "publicly owned treatment works" or "industrial discharges." See Ocean Plan, Appendix I (Definition of Terms).

⁵ See April 20, 2009 letter from Environmental & GIS Services, LLC to the Regional Board on behalf of SCWD ("eGIS Letter" attached as Attachment 2).

⁶ The Ocean Plan can be found at

http://www.swrcb.ca.gov/water_issues/programs/ocean/docs/oplans/oceanplan2005.pdf

II. A Permit Modification is Appropriate

A permit modification may be triggered in several ways. For example, a staff person at one of the Regional Boards conducting an inspection of a facility that finds a need for the modification (i.e., the improper classification of an industry, new treatment process, new waste stream), or information submitted by the discharger may suggest the need for a change. See 40 C.F.R. §122.62. Other circumstances dictate and in fact require modification of a permit. These conditions include:

- To correct technical mistakes, such as errors in calculation, or mistaken interpretations of law made in determining permit conditions.
- New information not available at the time of permit issuance (other than revised regulations, guidance, or test methods) justifies new permit conditions. See 40 C.F.R. §122.62(a).

As set forth herein, SOCWA and SCWD contend that the above circumstances require that the 2006 NPDES Permit be modified.

A. Mistaken Interpretations of Law

1. The 2006 NPDES Permit Erroneously Applies the Ocean Plan Standards to the GRF

The 2006 NPDES Permit erroneously treats the GRF as a POTW and/or industrial discharger. As discussed above, the 2006 NPDES Permit establishes effluent limitations for the GRF based on Table A of the Ocean Plan which are the default standards that "apply only to **publicly owned treatment works** and **industrial discharges** for which Effluent Limitations Guidelines have not been established pursuant to Sections 301, 302, 304, or 306 of the Federal Clean Water Act." Ocean Plan, at 1 (emphasis added). The GRF, however, is neither a POTW nor an industrial discharger.

A POTW is a publicly-owned "treatment works" which the CWA defines as:

(2)(A) any devices and systems used in the **storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature** to implement section 201 of this act, or necessary to recycle or reuse water at the most economical cost over the estimated life of the works, including intercepting sewers, outfall sewers, sewage collection systems, pumping, power, and other equipment, and their appurtenances; extensions, improvements, remodeling, additions, and alterations thereof; elements essential to provide a reliable recycled supply such as standby treatment units and clear well facilities; and any works, including site acquisition of the land that will be an integral part of the treatment process (including land use for the storage of treated wastewater in land treatment systems prior to land application) or is used for ultimate disposal of residues resulting from such treatment.

(B) In addition to the definition contained in subparagraph (A) of this paragraph, "treatment works" means any other method or system for preventing, abating, reducing, storing, treating, separating, or disposing of **municipal waste, including storm water runoff, or industrial waste, including waste in combined storm water and sanitary sewer systems**. Any application for construction grants which includes wholly or in part such methods or systems shall, in accordance with guidelines published by the Administrator pursuant to subparagraph (C) of this paragraph, contain adequate data and analysis demonstrating such proposal to be, over the life of such works, the most cost efficient alternative to comply with sections 301 or 302 of this act, or the requirements of section 201 of this act.

33 U.S.C. §1292 (emphasis added).

Unlike a POTW, the GRF does not treat municipal sewage, storm water runoff or any waste water, whatsoever. Nor is it a method or system for preventing, abating, reducing, storing, treating, separating, or disposing of municipal waste, including storm water runoff, or industrial waste, including waste in combined storm water and sanitary sewer systems. It simply extracts local groundwater, normally unusable due to its brackish nature, and filters and treats the water for potable use.

The GRF likewise does not qualify as an industrial discharger. The California Porter-Cologne Water Quality Control Act does not provide a definition for an "industrial discharger," however, the regulation implementing NPDES fees provides that:

NPDES permitted industrial discharger(s) means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category "Division D -Manufacturing" and such other classes of significant waste producers as, by regulation, the U.S. EPA Administrator deems appropriate. (33 USC Sec. 1362).

13 C.C.R. § 2200, fn 8. This regulation refers to the CWA which uses the term "industrial users":

(18) The term "industrial user" means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category of "Division D - Manufacturing" and such other classes of significant waste producers as, by regulation, the Administrator deems appropriate.

33 U.S.C. §1362.⁷

The CWA also refers to "industrial discharges" in the context of municipal and industrial stormwater discharge and requires that the "[p]ermits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title." 33 U.S.C. § 1342(p)(3)(A). The CWA regulations defines an "industrial discharger," as "any source of nondomestic pollutants regulated under section 307(b) of the [CWA] which discharges into a POTW." 40 C.F.R. § 125.58.

The GRF does not fit within any of these definitions. The GRF does not fall within any of the industries identified by the CWA or generate discharge as a result of any "industrial activity." Furthermore, as discussed above, prior to the implementation of the sewer diversion, the GRF discharged its brine effluent to the outfall, and thus, it did not qualify as a "source of nondomestic pollutants . . . which discharges into a POTW." See 40 C.F.R. § 125.58. The GRF does not *add* or *generate* any waste; rather, it simply extracts brackish and otherwise unusable groundwater and filters and treats the water for potable use. The GRF's brine effluent is merely a concentrated form of the natural constituents in the groundwater that is removed to obtain potable water from an existing resource. In sum, there is simply no indication that a GRF, a relatively uncommon type of facility, was intended to fall within the definition of an "industrial discharger" pursuant to the Ocean Plan.

⁷ The Standard Industrial Classification Manual ("SIC Manual"), Division D manufacturing categories do not include municipal entities. Instead the category is based on whether an establishment engages in the mechanical or chemical transformation of materials or substances into new products. See SIC Manual www.census.gov/eos/www/naics/